FILE COPY

Office - Supreme Court, U. S.
FILED
APR 25 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 750

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut
Of Counsel

April 25, 1949.

INDEX

PAGE

PETITION 1

SUMMARY STATEMENT OF MATTER INVOLVED 2

Summary of the Facts 2

Question Passed on by Lower Courts 3

Decision by District Court 3

Decision by Court of Appeals 4

BASIS OF THIS COURT'S JURISDICTION 5

QUESTION PRESENTED 5

On a Bond in Form Prescribed by the Post Office Department Which Runs for an Indefinite Term and With Respect to Which the Principal Pays Annual Premiums, Is the Penalty Cumulative or Continuing? 5

REASON FOR ALLOWANCE OF THE WRIT 6

The Decision by the Court of Appeals Below (By a Divided Court) Is Believed to Have Decided a Novel Question of Utmost Public Importance Which Has Not Been, But Should Be, Settled by This Court 6

PRAYER 7

BRIEF 9

OPINIONS BELOW 9

JURISDICTION 9

STATEMENT OF THE CASE 10

STATUTES INVOLVED 10

SPECIFICATION OF ERROR TO BE URGED 15

ARGUMENT 15

PAGE

POINT I

The express terms of the bond indicate a continuing, not an annually cumulative, liability.. 15

POINT II

The applicable statutory provisions and regulations promulgated thereunder likewise indicate a continuing, rather than a cumulative, liability 18

POINT III

The weight of decisional law overwhelmingly supports a construction of continuing, rather than cumulative, liability 24

CONCLUSION 30

TABLE OF CASES

Aetna Casualty & Surety Co. v. First National Bank, 103 F. (2d) 977 (C. C. A. 3rd, 1939).. 7, 27

Brulatour v. Aetna Casualty & Surety Co., 80 F. (2d) 834 (C. C. A. 2nd, 1936) 7, 25

Erskine v. United States, 84 F. (2d) 690 (C. C. A. 9th, 1936) 15

Fourth & First Bank & Trust Co. v. Fidelity & Deposit Company of Maryland, 153 Tenn. 176, 281 S. W. 785 (1926) 29

Frye v. State of New York, 78 N. Y. Supp. (2d) 342 (Court of Claims, 1948) 15

Hartford Accident and Indemnity Co. v. Hood, 226 N. C. 706, 40 S. E. (2d) 198 (1946) 29

	PAGE
Leonard v. Aetna Casualty & Surety Co., 80 F. (2d) 205 (C. C. A. 4th, 1935)	7, 27
Ex parte Marrin, 164 Fed. 631 (E. D. N. Y. 1908)	3
Montgomery Ward & Co. v. Fidelity & Deposit Co., 162 F. (2d) 264 (C. C. A. 7th, 1947)	7, 26
National Bank of North Hudson at Union City v. Nat'l Surety Co., 144 Atl. 576, 105 N. J. L. 330 (1929)	29
Quinlan & Tyson v. National Casualty Co., 311 Ill. App. 369, 36 N. E. (2d) 470 (1941)	29
State ex rel. Freeling, Atty. Gen. v. New Amsterdam Casualty Co., 236 P. 603 (Okl.) (1925)	29
United States v. American Surety Company 77 F. Supp. 318 (D. Conn. 1948)	3
172 F. (2d) 135 (C. C. A. 2nd, 1949)	4

OTHER AUTHORITIES CITED

Congressional Record, March 2, 1928, page 3936, Senator Phipps reporting for Committee on Post Offices and Post Roads	21
House of Representatives Report No. 383, Committee on the Post Office, January 24, 1928	20
Judicial Code, Section 240 (a) (28 U. S. C. A. § 1254	5, 9
Postal Laws and Regulations, Section 473	18
Postal Laws and Regulations, Section 71(5)	3, 16
Postal Laws and Regulations, Section 71(2)	3

PAGE

Postal Laws and Regulations, Section 70 22

Williston on Contracts (Rev. Ed.) § 621 15

Opinions of the Attorney General

26 Op. Atty. Gen. 70 19

United States Code Annotated

6 U. S. C. A. § 3 .....2, 10, 19, 20

6 U. S. C. A. § 6 ..... 11, 17

6 U. S. C. A. § 14 ..... 16, 17

6 U. S. C. A. § 15 ..... 4, 12, 22

39 U. S. C. A. § 132 ..... 13, 18

39 U. S. C. A. § 814 ..... 4, 14, 22

39 U. S. C. A. § 815 ..... 14, 19

American Law Reports

42 ALR 834 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American Surety Company of New York, defendant in the above action, respectfully prays for the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a judgment of that Court, entered January 25, 1949, affirming, by a divided Court, a judgment of the United States District Court for the District of Connecticut, entered February 16,

1948, as modified by a judgment of the said District Court, entered April 24, 1948, which judgment awarded the sum of $3,865.97, with interest, to the United States of America as plaintiff in this action upon a bond conditioned upon the faithful performance of duties by a postal employee.

SUMMARY STATEMENT OF MATTER INVOLVED

Summary of the Facts

The facts were not disputed (R. 7-9)*. The surety bond in question (R. 10) was on a form prescribed by the Post Office Department for more than fifty years. It was given pursuant to statutory law and postal regulations to secure the faithful performance of duties by one William H. Welge, a clerk in the Post Office at Essex, Connecticut. This bond ran for the term of service of Welge, in accordance with 6 U. S. C. A. § 3, which provides that "* * * The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal.* * *"

The bond was dated October 26, 1935. It was in the penal sum of $2,000. The only reference to premium contained in the bond is the following (R. 10):

> "The premium of this bond is $0.65 per $1,000. The amount of premium charged for a like bond during the year 1908 was $2.00 per $1,000. Total premium charged $1.30."

---

*All references in this Petition and in the accompanying Brief to the Record are to printed page numbers thereof, unless otherwise indicated.

This is surplusage insofar as the condition of the bond is concerned, being merely the "certificate" which Postal Laws and Regulations § 71 (5) requires shall appear *on* the bond. The bond is the same form required when personal sureties are offered (Postal Laws and Regulations § 71 (2); *Ex parte Marrin,* 164 Fed. 631 (E. D. N. Y. 1908)).

Welge paid the certified premium for each of the years 1935 through 1944. On November 27, 1944 it was discovered that he had been guilty of a series of embezzlements aggregating $7,949.72 beginning in 1935. No defalcation exceeded $2,000 in any one year. After deducting recoveries effectuated from Welge, the net loss to the Government was $3,865.97. An action to recover this amount was brought on the bond. The defendant as surety admitted its liability to the extent of $2,000, the amount of the bond, and tendered payment of that amount.

Question Passed on by Lower Courts

The question passed on by the District Court and by the Court of Appeals was whether the $2,000 penalty provided for in the bond should be construed as cumulative for each year in which the bond was in force (as contended by the respondent) or as continuous during the employment of the postal employee after the writing of the bond (as contended by the petitioner).

Decision by District Court

The District Court (Smith, D. J.) held that the penalty should be construed as cumulative, resting its decision in part upon the canon of construction that, the petitioner being a compensated surety, any uncertainty in the language of the

bond should be construed against the petitioner as the draftsman (R. 12-21). When the attention of the court upon a rehearing was directed to the fact that the bond in question was on a form prescribed by the United States Post Office Department (R. 26), the court rested its decision on the theory that "it seems more likely that the parties contemplated cumulative coverage" (R. 26; reported at 77 F. Supp. 318).

Decision by Court of Appeals

The Court of Appeals, by a divided vote, affirmed the judgment of the District Court. Judge Clark wrote the opinion of the Court, concurred in by Judge Augustus N. Hand (R. 35-41; reported at 172 F. (2d) 135). Judge Swan wrote a dissenting opinion (R. 41-43; reported at 172 F. (2d) 139).

The majority, in construing the penalty provided for in the bond as cumulative, held that it "does not seem rational to believe that the United States would require a contract from a surety of so little practical value or that a company in business as a paid surety would be justified in contemplating that it had promised so little" (R. 41).

The dissenting opinion noted that the unambiguous terms of the bond, as well as the relevant statutory provisions applicable to bonds given by postal employees, indicated a continuing, not an annually cumulative, liability (R. 41). The dissenting opinion further stressed the option available to a postal employee (39 U. S. C. A. § 814), in lieu of filing a fidelity bond, of depositing Government securities "in a sum equal at their par value to the amount of such penal bond required to be furnished" (6 U. S. C. A. § 15), which obviously did not contemplate that an em-

ployee who exercised this option would be required annually thereafter throughout his term of service to post additional securities of like amount. The dissenting Judge regarded as significant the inconsistency between not requiring an employee who elects to post securities in lieu of a surety bond to duplicate the deposit each year and in imposing cumulative liability on the corporate surety of one who elects to give a bond with such surety instead of posting securities or procuring personal sureties (R. 42).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered January 25, 1949 (R. 44-45). The within petition for certiorari was filed April 25, 1949.

QUESTION PRESENTED

The sole question passed upon by the lower courts and presented for determination by this Court is:

> On a bond in form prescribed by the Post Office Department which runs for an indefinite term and with respect to which the principal pays annual premiums, is the penalty cumulative or continuing?

[*The District Court held the penalty was cumulative (R. 21), and the Court of Appeals, by a divided vote, affirmed (R. 41).*]

REASON FOR ALLOWANCE OF THE WRIT

The Decision by the Court of Appeals Below (By a Divided Court) Is Believed to Have Decided a Novel Question of Utmost Public Importance Which Has Not Been, But Should Be, Settled by This Court.

This case presents for determination the nature and extent of liability to be imposed upon a surety under a government form of bond, indefinite in term, for a postal employee required to give bond under a specific provision of law. Its implications may be expected to affect the bonds of other government employees and even the fidelity bonds of private individuals. The scope of the question presented is far reaching.

Moreover, no court has ever before held that the payment by a principal of annual premiums on an indefinite term bond converts the bond in effect into a series of separate annual contracts with the result that cumulative liability is imposed on the surety. The decision by the Court of Appeals is novel, as acknowledged by Judge Clark, writing for the Court (R. 36):

> "No cases directly in point have been discovered and we must proceed in the light of the wording of the contract against its background, aided by the incomplete analogy of other cases involving bonds of comparable, but not exactly similar, wording."

And Judge Swan, in his dissenting opinion, stated (R. 43):

> "Concededly there is no decision involving a bond of identical terms."

While the question raised by the instant case does not appear to have been passed upon by any court, prior to the decisions of the courts below, the decisions of those courts are in conflict with the well established principle that in the case of a bond for an indefinite term the payment of annual premiums results in a continuing, not a cumulative, liability and does not give rise to a series of separate yearly contracts. In this respect, the decisions of the courts below are in conflict with the following decisions by several Courts of Appeals:

Montgomery Ward & Co. v. *Fidelity & Deposit Co.*, 162 F. (2d) 264 (C. C. A. 7th, 1947);

Aetna Casualty & Surety Co. v. *First National Bank*, 103 F. (2d) 977 (C. C. A. 3rd, 1939);

Brulatour v. *Aetna Casualty & Surety Co.*, 80 F. (2d) 834 (C. C. A. 2nd, 1936);

Leonard v. *Aetna Casualty & Surety Co.*, 80 F. (2d) 205 (C. C. A. 4th, 1935).

PRAYER

For the reasons outlined above, developed more in detail in the accompanying brief, your petitioner prays that a writ of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit and that the duly certified transcript of the proceedings below which accompanies this petition shall be treated as though filed in response to the aforesaid writ, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Court of Appeals may be reversed; and that

your petitioner may be granted such other, further and different relief as this Court may deem proper.

Dated: Stamford, Connecticut, April 25, 1949.

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

—against—

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinions of the District Court (R. 12-21, 26) are reported at 77 F. Supp. 318 and 77 F. Supp. 320. The opinion of the Court of Appeals for the Second Circuit (R. 34-576) is reported at 172 F. (2d) 135.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of June 25, 1948 (28 U. S. C. A. § 1254).

The judgment of the Court of Appeals, of which the petitioner herein seeks review, was entered January 25,

1949 (R. 44-45). The within petition for certiorari was filed April 25, 1949.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the petition at pages 2-5, *supra*. Summary of the argument is set forth in the index.

STATUTES INVOLVED

The following statutory provisions, in relevant part, are involved herein.

6 U. S. C. A. § 3:

> "Every officer whose duty it is to take and approve official bonds shall cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary. In the discretion of such officer the requirement of a new bond may be waived for the period of service of a bonded officer after the expiration of a four-year term of service pending the appointment and qualification of his successor. The nonperformance of any requirement of the provisions of sections 1 to 3 of this title, or of that part of section 27 of title 19 relating to transmitting copies of oaths to the Secretary of the Treasury, on the part of any official of the Government shall not be held to affect in any respect the liability of principal or sureties on any bond made or to be made to the United States. The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualifica-

tion of the successor of the principal. Nothing in said sections shall be construed to repeal or modify section 38 of title 39: Provided, That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees, officers and employees of other civilian agencies of the United States and bonded officers and enlisted men of the Army, Navy, Marine Corps and Coast Guard shall be a compliance with the requirement for the renewal of such bonds within the meaning of sections 1 to 3 of this title." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. A. § 6:

"Whenever any recognizance, stipulation, bond, or undertaking conditioned for the faithful performance of any duty, or for doing or refraining from doing anything in such recognizance, stipulation, bond, or undertaking specified, is by the laws of the United States required or permitted to be given with one surety or with two or more sureties, the execution of the same or the guaranteeing of the performance of the condition thereof shall be sufficient when executed or guaranteed solely by a corporation incorporated under the laws of the United States or of any State having power to guarantee the fidelity of persons holding positions of public or private trust, and to execute and guarantee bonds and undertakings in judicial proceedings. Such recognizance, stipulation, bond, or undertaking shall be approved by the head of department, court, judge, officer, board, or body executive, legislative, or judicial required to approve or accept the same. No officer or person having the approval of any bond shall exact that it shall be furnished by a guaranty company or by any par-

ticular guaranty company." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

6 U. S. C. A. § 15:

"Wherever by the laws of the United States or regulations made pursuant thereto, any person is required to furnish any recognizance, stipulation, bond, guaranty, or undertaking, hereinafter called 'penal bond', with surety or sureties, such person may, in lieu of such surety or sureties, deposit as security with the official having authority to approve such penal bond, United States Liberty bonds or other bonds or notes of the United States in a sum equal at their par value to the amount of such penal bond required to be furnished, together with an agreement authorizing such official to collect or sell such bonds or notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. The acceptance of such United States bonds or notes in lieu of surety or sureties required by law shall have the same force and effect as individual or corporate sureties, or certified checks, bank drafts, post-office money orders, or cash, for the penalty or amount of such penal bond. The bonds or notes deposited hereunder, and such other United States bonds or notes as may be substituted therefor from time to time as such security, may be deposited with the Treasurer of the United States, a Federal Reserve bank, or other depositary duly designated for that purpose by the Secretary, which shall issue receipt therefor, describing such bonds or notes so deposited. As soon as security for the performance of such penal bond is no longer necessary, such bonds or notes so deposited shall be returned to the depositor. * * * All laws inconsistent with this section are hereby so modified as to conform to the provisions hereof.

Nothing contained herein shall affect the authority of courts over the security, where such bonds are taken as security in judicial proceedings, or the authority of any administrative officer of the United States to receive United States bonds for security in cases authorized by existing laws. The Secretary may prescribe rules and regulations necessary and proper for carrying this section into effect. The term 'person' in this section means an individual, a trust or estate, a partnership, or a corporation; the term 'Secretary' means the Secretary of the Treasury. In order to avoid the frequent substitution of securities such rules and regulations may limit the effect of this section, in appropriate classes of cases, to bonds and notes of the United States maturing more than a year after the date of deposit of such bonds as security. The phrase 'bonds or notes of the United States' shall be deemed, for the purposes of this section, to mean any public-debt obligations of the United States and any bonds, notes or other obligations which are unconditionally guaranteed as to both interest and principal by the United States." (July 30, 1947, c. 390, § 1, 61 Stat. 646).

39 U. S. C. A. § 132:

"Assistant postmasters and cashiers at first, second, and third class post offices, and when deemed necessary by the Postmaster General for the better protection of the interests of the Government any other employees in such offices, shall, before entering upon the duties of their office, give bond to the United States with good and approved security, and in such penalty as the Postmaster General shall prescribe, conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department." (June 13, 1898, c. 446, § 3, 30 Stat. 444.)

39 U. S. C. A. § 814:

"The Postmaster General may, under such rules and regulations as he shall prescribe, accept United States Liberty loan bonds in lieu of either corporate or personal surety from contractors, officers, and employees of the Postal Service to indemnify the Government against losses resulting from the failure of any contractor, officer, or employee of the Postal Service to properly discharge his official duty." (July 2, 1918, c. 117, § 6, 40 Stat. 753.)

39 U. S. C. A. § 815:

"Whenever any postmaster, clerk, carrier, or other person in the Postal Service, employed in the Post Office Department or elsewhere, notifies the Postmaster General of his desire to execute a new bond, or whenever any of the sureties of such postmaster, clerk, carrier, or other person, notifies the Postmaster General of his desire to be released from such suretyship, or whenever the Postmaster General deems a new bond necessary or expedient, the execution of the new bond may be directed by the Postmaster General. When accepted by the Postmaster General the sureties of postmasters in the prior bond shall be released from responsibility for all acts or defaults of the postmaster which may be done or committed subsequent to the last day of the quarter in which such new bond shall be executed and accepted, and the sureties of other persons in the prior bond shall be released from responsibility for all acts or defaults of such persons which may be done or committed subsequent to the day such new bond becomes operative." (Mar. 3, 1905, c. 1488, 33 Stat. 1259.)

SPECIFICATION OF ERROR TO BE URGED

The Court of Appeals erred in holding the penalty cumulative rather than continuing on a bond in form prescribed by the Post Office Department running for an indefinite term and with respect to which the principal pays annual premiums.

ARGUMENT

POINT I

The express terms of the bond indicate a continuing, not an annually cumulative, liability.

Since the bond in suit is on a printed form prepared by the Post Office Department (R. 10), any ambiguities in the instrument should be construed against the Government according to a well-recognized canon of construction (Williston on Contracts, Rev. Ed., § 621), particularly when the contract form is furnished by a Governmental agency (*Erskine* v. *United States,* 84 F. (2d) 690 (C. C. A. 9th, 1936); *Frye* v. *State of New York,* 78 N. Y. Supp. (2d) 342 (Court of Claims, 1948)).

The bond in question in the instant case, however, presents no ambiguity. Its express terms indicate a continuing, not an annually cumulative, liability. It appears on the face of the bond that there is no fixed term for the bond. The condition of the bond is simply that "if the said employee shall, on and after October 26, 1935, faithfully discharge all the duties and trusts imposed on him." The term of the bond therefore is clearly intended to be the period of the principal's employment on and after October 26, 1935. If

there had been any intention whatsoever on the part of the Government to enter into a series of contracts each of which would impose liability in the amount of $2,000 per year, it would have been a very simple matter for the Government, in preparing and printing its own form of bond, to have expressly limited its term to one year. It failed to do so and instead employed the plainest possible language of continuing liability with the penalty stated to be $2,000, whether the term of the principal's employment turned out to be one year or ten years.

The terms of the bond being free from ambiguity, the corporate surety stands on the same footing as a personal surety executing the same form. The only reference in the bond to the matter of premium is the "certificate" required under Postal Laws and Regulations § 71(5).

The fact that the petitioner in the ordinary course of its business under its collateral agreement with its principal collected each year from its principal a premium of $1.30 is of no relevance. The respondent had no concern with such collateral agreement between the petitioner and the principal, since it is well settled that after the execution and delivery of the bond, it was in full force and effect even if no premium was ever paid. Obviously the petitioner was not entitled to deny its obligation under the bond because of non-payment of the premium by the principal. The respondent not only was under no liability for the payment of the premium but by law was forbidden to pay the premium (6 U. S. C. A. §14).

The fact that the principal by collateral agreement with the respondent paid the premium in annual installments can have no more legal significance, so far as the

construction of the bond is concerned, than if the principal had paid the premium in monthly or semi-monthly installments. In the latter situation, it could hardly be contended that the premium payments converted a bond of continuing liability into a series of separate contracts each for $2,000 of liability or a total accumulation over a period of a year of $24,000 or $48,000 of liability. Such a grotesque result, clearly not contemplated by the express terms of the bond, would differ only in degree from the result reached by the courts below, namely, that the petitioner, having executed the bond under the law of August 13, 1894 (6 U. S. C. A. § 6) which placed corporate sureties on an equal footing with personal sureties, is faced with a total cumulative liability of $20,000 simply because it collected its premium from the principal over a period of ten years at a rate fixed by statute (6 U. S. C. A. § 14).

Wherever possible, a writing is judicially resolved according to its terms, and the court will not look beyond unless compelled to do so by reason of ambiguity or failure to express the common intent of all the parties. While ambiguity may open a door to other relevant writings and to parole, failure to express mutual intent may be cured only by reformation of the writing. Reformation has not here been sought, and the principle need not be dealt with further than to say that if the government did intend that the penalty should be cumulative, the surety did not so intend, and the intent of one party not corresponding with that of the other is not persuasive. Far from the taint of ambiguity, the bond is explicit in every constituent detail. It runs for the term of the employees' employment, and the corporate surety obligates itself during that term for $2,000 with respect to official misdeeds of the employee.

POINT II

The applicable statutory provisions and regulations promulgated thereunder likewise indicate a continuing, rather than a cumulative, liability.

The bond in question was authorized by a federal statute permitting the Postmaster General to require that certain postal employees "when deemed necessary by the Postmaster General for the better protection of the interests of the Government * * * before entering upon the duties of their office * * * give bond to the United States with good and approved security, and in such penalty as the Postmaster General shall prescribe, conditioned for the faithful discharge of all duties and trusts imposed upon them either by law or the rules and regulations of the Post Office Department" (39 U. S. C. A. § 132).

The Post Office at Essex, Connecticut, where Welge was employed in 1935 at the time of the execution of the instant bond was a second class post office. Postal Laws and Regulations § 473 provides that bonds of all employees of first and second class post offices shall be "in accordance with the forms prescribed by the Department".

The Government has not only the power to determine when bonds are to be required of postal employees "for the better protection of the interests of the Government" and to prescribe the forms upon which such bonds shall be written, but it also has the power from time to time to order an increase in the amount of such bonds to provide greater security for the Government; also, to lessen the danger of suretyship deteriorating in value, "Every officer whose duty it is to take and approve official bonds shall

cause all such bonds to be renewed every four years after their dates, but he may require such bonds to be renewed or strengthened oftener if he deem such action necessary" (6 U. S. C. A. § 3).

Likewise, new bonds for postal employees may be substituted for old bonds whenever desired by "any postmaster, clerk, carrier or other person in the Postal Service or when the sureties on postal bonds desire to be released from their suretyship or whenever the Postmaster General deems a new bond necessary or expedient" (39 U. S. C. A. § 815).

These provisions are wholly inconsistent with the notion that the bonds are for terms of one year each. They clearly indicate that the bonds are intended for a period of indefinite duration, terminable only under circumstances prescribed in the foregoing statutory provisions. We submit that there cannot be the slightest doubt as to the Congressional intent that the liability to be created by such bonds was meant to be a continuing, not a cumulative, one. It would be difficult to find a plainer legislative mandate than the following language squarely in point (6 U. S. C. A. § 3):

> "The liability of the principal and sureties on all official bonds shall continue and cover the period of service ensuing until the appointment and qualification of the successor of the principal."

Further confirmation of the concept of continuing liability in bonds of this type is found in 26 Op. Atty. Gen. 70:

> "Bonds given to the United States for the faithful discharge of their duties by officers thereof which are not in terms limited to a specific period expressed

> in dates remain in full force and effect so long as such officer continues in office even though another and different bond by way of renewal may be given."

The legislative development of the statute cited above (6 U. S. C. A. § 3) providing for continuing liability upon official bonds is significant in its bearing upon the question under consideration. This statute in its original form required that such bonds be renewed at least every four years. In order to eliminate the uneconomical and unnecesary renewal procedure required by this statute for bonds written by Treasury-supervised surety companies, the statute was amended in 1928, at the instance of the Post Office Department, to provide that "the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees * * * shall be a compliance with the requirement for the renewal of such bonds" within the statutory meaning (45 Stat. 247). Congress certainly considered the postal employee bonds to be bonds of continuing, rather than cumulative, liability in providing that the acceptance of the annual premium might be substituted for the earlier statutory requirement of quadrennial renewal.

The following comment upon the proposed amendment is found in H. R. Rep. No. 383, Committee on the Post Office, January 24, 1928:

> "Section 5 of the act of March 2, 1895, requires the renewal of bonds every four years and an examination of bonds every two years with respect to their sufficiency. Compliance with the existing statute results in no benefit to the Government, but causes a loss of time. Post Office officials and employees very generally furnish bonds written by corporate surety companies, and these companies are under the super-

vision of the Treasury Department. So long as the Treasury Department approves a bonding company as acceptable to the Government there is no benefit derived from requiring an employee who furnishes a corporate surety bond to renew that bond at stated intervals. The department may require an official or an employee at any time to furnish a new bond if the existing bond is not sufficient.

"Renewing bonds every four years means extra expense to the employees and more work for the department in recording and filing the bonds. The proposed amendment, which is made in the interest of economy, reads as follows:

"Provided, that the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a compliance with the requirement for the renewal of such bonds within the meaning of this act.

"The enactment of this proposed amendment into law is urged by the Postmaster General."

Likewise the proposed amendment was commented upon in the Senate, Cong. Rec., March 2, 1928, p. 3936 (Senator Phipps reporting for the Committee on Post Offices and Post Roads):

"The department advises as follows:

"Renewing bonds every four years means extra expense to the employees and more work for the department in recording the filing of the bonds. The proposed amendment, which is made in the interest of economy, reads as follows:

" 'Provided, That the payment and acceptance of the annual premium on corporate surety bonds furnished by postal officers and employees shall be a

compliance with the requirement for the renewal of such bonds within the meaning of this act.'

"This is a matter, Mr. President, which might really have been passed upon by the department itself, but they did not feel that they had the authority. It does not make any change in the status of the bond whatever, but at the expiration of the four years the Government employee in the Postal Service having paid his annual premium, the bond continues on, the surety having already been approved by the postal authorities."

Probably the most conclusive indication that Congress intended that the postal employee bond in question should be one creating continuing liability, and not cumulative liability, is found in the option (39 U. S. C. A. § 814) given to a postal employee, in lieu of posting a fidelity bond, to deposit Government securities "in a sum equal at their par value to the amount of such penal bond to be furnished" (6 U. S. C. A. § 15). The Postmaster General has promulgated Postal Laws and Regulations § 70 to implement the statutory authority given him in this respect. Obviously such statutory provisions and administrative regulations permitting the deposit of $2,000 of Government securities in lieu of a surety bond in the same amount do not contemplate that a postal employee who exercises such option must annually thereafter throughout his term of service post additional securities in the same amount. Thus it is utterly impossible to reconcile the one statutory provision, which in no conceivable way can be construed to impose cumulative liability with respect to an employee who elects to post securities in lieu of a surety bond, with the companion, alternative statutory provision which the Court below construed to impose cumulative liability with respect to an employee who elects to give a bond instead of posting securities.

The Government now seeks to write into the bond in question multiplication not even suggested by its terms, particularly through the forced construction of the various statutory provisions which deal with the three classes of protection which an employee is authorized to give the government:

(1) Deposit of approved securities of fixed value;

(2) A bond with individual justified sureties;

(3) A bond with corporate surety.

As to (1), the amount remains fixed during the term of employment. As to (2), the individual sureties are required to justify every four years. As to (3), the payment of a yearly premium is evidence of a renewal of the bond.

The employee is not required to supplement a security deposit; so there, no matter what the duration of the employment, the Government's coverage remains constant. Individual sureties, without distinction as to gratuitous or paid, every four years give evidence that they are still able to respond to the extent of their original obligation. Premium payments to corporate sureties evidence the continuance of the Government's coverage.

Indicative of continuing, rather than cumulative, liability is Instruction 9 printed on the back of the bond (Exhibit A; R. 10):

> "Instructions.
>
> 1. It is not required that both corporate and individual surety be furnished, and either kind will be accepted.
>
> * * * * *
>
> 9. The individual sureties must justify, in sums, in unincumbered real estate, equal in the aggregate

to double the penalty of the bond, before a notary public, justice of the peace, or other officer authorized to administer oaths, except a postmaster."

The Government's present contention in logical application would produce incongruous and inequitable situations with constant or variable coverage according to the employee's choice of security: in instances of security deposit, there would never be any increase in coverage, a constant; in instances of individual sureties, there would either be no increase in coverage or a doubling every four years, either a constant or a fluid variable; in instances of corporate sureties, the original coverage would be duplicated annually, a variable.

The rational appraisement of these statutory provisions is that they are intended to assure evidence periodically, where necessary, of continued coverage, and that they are not concerned with the amount of the coverage.

POINT III

The weight of decisional law overwhelmingly supports a construction of continuing, rather than cumulative, liability.

Both Judge Clark, writing for the majority (R. 36), and Judge Swan, in his dissenting opinion (R. 43), conceded that there is no decision directly in point involving a bond in terms identical to those of the bond in the instant case. There is very substantial authority, however, in support of the proposition that where a fidelity bond is for an indefinite term and the only date given is the date the bond becomes effective, the liability created by such a bond is a continuing liability and the fact that premiums are paid annually does not give rise to a series of separate yearly contracts.

In the case of *Brulatour* v. *Aetna Casualty & Surety Co.*, 80 Fed. (2d) 834 (C. C. A. 2nd, 1936), the bond before the court was a fidelity bond, upon which the annual premiums were paid by the employer. The bond was for an indefinite term but might be terminated upon notice by either party. Yearly schedules furnished by the employer set forth the number of positions covered and the amount of coverage required. The schedules recited the "renewal" premiums as consideration for the bonds. In holding that the bond created a continuing liability and did not give rise to a series of separate yearly contracts, the court stated (p. 835):

> "The bond and its yearly schedules did not constitute separate contracts. There is nothing either in the contract or the evidence to indicate that the original contract set up by the bond ever ended. None of the specified means of termination were employed, and there is no showing that it would expire automatically. The bond recited a consideration of an annual premium. This was paid yearly for a continuation of the insurance, as the premiums of a life insurance policy are paid to continue a single contract. The yearly schedules all expressly state that the coverage is under the original bond. The fact that the schedules recited a date upon which they should become effective is not an indication that this original obligation terminated and was renewed each year."

Then the court summarized the rule supported by the weight of the authorities as follows (p. 836):

> "The authorities support the appellant's claims. . . . (they) illustrate the rule that, where the bond is for an indefinite term, the date it begins to run

being the only date given, the fact that the premiums were paid annually does not make the relation a series of separate yearly contracts."

In *Montgomery Ward & Co.* v. *Fidelity & Deposit Co.*, 162 F. (2d) 264 (C. C. A. 7th, 1947), the court stated (p. 266):

> "It is undisputed that the most pertinent factors to be considered in the determination of whether the liability of a suretyship bond is cumulative or continuous are the terms of the bond itself and the acts of the parties in contemplation of the terms of the bond."

In that case a fidelity bond was issued conditioned upon the faithful performance of a public official. The court held that the bond had no expiration date despite the fact that on its back appeared the words "Dated September 1, 1935, Expired September 1, 1936". Since this notation was not signed, the court held it should be disregarded. In construing the bond as one creating continuing liability, the court stated (p. 266):

> "As we have already observed, the bond is for an indefinite term. Dated September 1, 1935, it is void only upon O'Connell's accounting to and turning over 'to his successor in office, or to such other persons as may be designated by his superior officer, all records, property, money, books and papers, and all other property appertaining to his office * * * that shall come into his hands by virtue of said office * * *.' From the foregoing, it is clear that the bond was to remain in force as long as O'Connell remained in office, whether that be for six months or six years. Apparently there was no contractual method for termination by affirmative action of the parties, as none appears on the face of the bond."

In the case of *Aetna Casualty & Surety Co.* v. *First National Bank,* 103 F. (2d) 977 (C. C. A. 3rd, 1939), the court held that a fidelity bond, issued to cover losses occasioned by the dishonesty of a bank cashier and terminable only by notice or the retirement of such cashier, created a continuing liability despite the payment of premiums on an annual basis (pp. 978-979):

> "Upon its face the bond represents a continuous and continuing liability upon the part of the appellant which could be terminated only as provided by the fourth clause of the bond. The schedule shows the amount of insurance carried in respect to Trezise as $15,000. This represents the maximum amount of the appellant's liability in respect to the employee named. There is not a word or a phrase in the bond which indicates the creation of successive periods of liability on the part of the appellant."

In *Leonard* v. *Aetna Casualty & Surety Co.,* 80 F. (2d) 205 (C. C. A. 4th, 1935), a bank paid the annual premiums on a fidelity bond covering its employees. The bond was terminable only by written notice of the bank or by retirement of the employee covered. In holding that the bond was a continuous contract covering the entire period of employment and was not to be construed as giving rise to a series of independent, annual contracts, the court stated (p. 206):

> "The question at issue is to be decided by determining whether the parties contemplated a single continuous contract covering the entire period, or a series of independent contracts, each for the period of one year; and the solution necessarily depends upon the terms of the bond. It will be noticed in the first place that the instrument did

> not specify a definitely limited period terminating on a certain date, with the privilege of renewal, but covered the period commencing on August 17, 1925, and continuing until the suretyship was terminated by affirmative action, that is, by notice of termination by one of the parties to the contract, by retirement of the employee from the service, or by the discovery of loss. Secondly, no additional agreement was needed to extend the period of the coverage of the bond. It is true that an annual premium was to be paid by the bank, but this provision did not limit the period of the contract; it merely described the consideration running to the surety. There was no requirement for the renewal of the bond upon payment of the annual amount, and no stipulation that liability should cease if the annual premium should not be paid. Finally, the limitation upon the liability of the surety as to each year of the period did not become effective with regard to the expiration of the year, but only with regard to the expiration of one continuous term; for the fourth paragraph of the bond, quoted above, provided that the surety should be liable for losses discovered during the term of the bond 'or within two years after termination thereof'."

The court went on to summarize the consensus of the authorities on this point as follows:

> "They point out that such bond as that now under discussion is not made for one year with the privilege of renewal annually, but one entire bond for an indefinite period, or for such period as it should be continued by payment of an annual premium like an ordinary life insurance policy; that no additional action of the parties is necessary to keep the contract in force, and it is not necessary to make

a new contract each year; and, moreover, that bonds of this sort extend the time for discovery of loss and remove the difficulty experienced by the obligee in many cases of proving when a defalcation occurred and against what period of contract it should be charged. It may be that the last-mentioned benefit is not so valuable to the assured as the right to collect the amount of the bond for each of the years in which a defalcation occurs, as is strongly urged in Aetna Cas. & Surety Co. v. Commercial State Bank (D. C.) 13 F. (2d) 474 (reversed on other grounds in (C. C. A.) 19 F. (2d) 969); but it is for the parties and not for the court to agree upon the obligations by which they are to be bound."

The following authorities are to the same effect as those discussed above:

Hartford Accident and Indemnity Co. v. *Hood,* 226 N. C. 706, 40 S. E. (2d) 198 (1946);

Quinlan & Tyson v. *National Casualty Co.,* 311 Ill. App. 369, 36 N. E. (2d) 470 (1941);

National Bank of North Hudson at Union City v. *Nat'l Surety Co.,* 144 Atl. 576, 105 N. J. L. 330 (1929);

Fourth & First Bank & Trust Co. v. *Fidelity & Deposit Company of Maryland,* 153 Tenn. 176, 281 S. W. 785 (1926);

State ex rel. Freeling, Atty. Gen. v. *New Amsterdam Casualty Co.,* 236 P. 603 (Okl.) (1925).

See also: 42 ALR 834.

CONCLUSION

For the reasons stated in the petition and in this brief, and particularly since the question here presented is a novel one of utmost public importance, we urge that a writ of certiorari be issued by this Court in order that the question presented in the foregoing petition may be reviewed by this Court.

Dated: Stamford, Connecticut, April 25, 1949.

Respectfully submitted,

MARK W. NORMAN
CYRIL COLEMAN
WILLIAM H. TIMBERS
Attorneys for Petitioner
One Atlantic Street
Stamford, Connecticut

CUMMINGS & LOCKWOOD
Stamford, Connecticut
Of Counsel.